Supreme Court, U.S.
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No. 08-742

IN THE

Supreme Court of the United States

KAREN JESENSKY and ANTHONY JESENSKY,

Petitioners,

v.

DUQUESNE LIGHT CO. and McCARLS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT DUQUESNE LIGHT COMPANY

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MODIFIED QUESTIONS PRESENTED

1. Whether a [~~private~~] ***government*** contractor whose contract performance is closely supervised by an officer or agency of the United States may invoke the federal officer removal statute with respect to a state law action based upon conduct [~~***not***~~] specifically directed by the government?

2. Whether a Court of Appeals may affirm a grant of summary judgment in a case removed from state court without ***[~~addressing a~~] providing written analysis of an otherwise implied finding that there is no*** substantial question as to the existence of federal subject matter jurisdiction?

CORPORATE DISCLOSURE STATEMENT

Respondent, Duquesne Light Company is wholly owned by Duquesne Light Holdings, Inc.

Respondent McCarls, Inc. is represented by other counsel.

TABLE OF CONTENTS

	Page
MODIFIED QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	v
PERCEIVED MISSTATEMENTS OF FACT IN PETITIONERS' PHRASING OF "QUESTIONS PRESENTED"	1
ARGUMENT	4
1. The Petition Does Not Present an Important Question of Federal Law that Should be Decided by this Court	4
2. The Petition Does Not Present Any Conflict Between United States Courts of Appeals on an Important Matter	5
a. There is No Conflict with *Winters* and/or *Isaacson*	6
b. There is No Conflict with *Boyle* and/or *In re Joint*	8

Contents

Page

3. The Court of Appeals Conformed with the Accepted and Usual Course of Judicial Proceedings 11

CONCLUSION 13

TABLE OF CITED AUTHORITIES

Page

Cases:

Boyle v. United Technologies Corp., 487 U.S. 500 (1988) 8, 9, 10

In re Joint Eastern and Southern District New York Asbestos Litigation, 897 F.2d 626 (2d Cir. 1990) 8, 9, 10

Issacson v. Dow Chemical Co., 517 F.3d 129 (2d Cir. 2008) 6-7, 8

Mesa v. California, 489 U.S. 121 (1989) 4, 9

Watson v. Philip Morris Cos., 127 S. Ct. 2301 (2007) 4, 10

Winters v. Diamond Shamrock Chemical Co., 149 F.3d 387 (5th Cir. 1998) 4, 6, 7, 8

Rules of the Supreme Court of the United States (2007):

Rule 10 3

Rule 14.4 3

Rule 15.2 1

Rule 24.2 1

Page

Internal Operating Procedures of The United States Court of Appeals for the Third Circuit:

IOP 4.2 11

IOP 5.1 8

IOP 5.3 8

IOP 5.7 8

IOP 6.2 11

PERCEIVED MISSTATEMENTS OF FACT IN PETITIONERS' PHRASING OF "QUESTIONS PRESENTED"

As permitted by Supreme Court Rule 24.2, Respondent has rephrased the Questions Presented above because Petitioners' versions are perceived to contain misstatements of fact about what occurred in the proceedings below, and because Supreme Court Rule 15.2 requires Respondent to bring such matters to the Court's attention at the earliest possible occasion or risk having them deemed waived. In each of the Modified Questions Presented above, the amended language appears in bracketed, bold and italicized text to highlight the precise change that was made to Petitioners' phraseology.

First, the word "government" was substituted for the word "private" in the first Question Presented because it is undisputed that Duquesne Light was at all relevant times under direct contract with the Federal government, and hence, a government contractor. The remaining language removed from the first Question Presented read "not" specifically directed, and constituted a misstatement of fact because neither the United States Court of Appeals for the Third Circuit nor the District Court found as fact that the conduct at issue (i.e., Duquesne Light's use of asbestos-containing insulation) was not specifically directed by the government. Indeed, the Third Circuit made no written finding on this question at all and the District Court's opinion (which the Court of Appeals affirmed) found exactly the opposite fact to be true, as the record will reflect. *See:* Magistrate Judge's Report and

Recommendation – 5/29/03; *and* Order of the United States District Judge adopting the Magistrate Report and Recommendation as the opinion of the court – 6/30/03. App. 11-29. The Magistrate Judge's Report specifically rejected Petitioners' proposed finding that the conduct at issue was not specifically directed by the government. In addressing the one document upon which Petitioners relied in their attempt to establish that the specification for asbestos insulation originated with Duquesne Light, the Magistrate Judge wrote: "[Petitioners/Plaintiffs] do not identify any page of that document . . . which required the use of asbestos containing material." *See* App. 14. Likewise, the Magistrate Judge addressed the witness testimony upon which Petitioners relied for the same purpose: "This testimony does not establish that the specification for use of asbestos originated with Duquesne." *See* App. 14-15. In contrast, the Magistrate Judge found that Respondent, "Defendant Duquesne [did] produce substantial evidence that a federal officer . . . exercised direct detailed control of the Shippingport facility." *See* App. 15-16. "This included approval of the thermal insulation used at the plant." *See* App. 16. The Magistrate Judge was particularly convinced by the contents of one document that the government specifically directed Duquesne Light's use of asbestos-containing insulation. To the Magistrate Judge's eye "[t]his document would appear to establish that [the federal officer] directed the extent to which workers would be protected from exposure to asbestos . . ." *See* App. 17-18.

Petitioners' first Question Presented ignores the evidence of record and the District Court's factual

findings upon its review of that record. Petitioners' failure to accurately present this Question is, alone, a "sufficient reason for the Court to deny a petition" as provided in Supreme Court Rule 14.4. If it is Petitioners' intent to argue that the District Court's factual findings were erroneous, then they are asserting an error for which "[a] petition for writ of certiorari is rarely granted . . ." per the Court's Rule 10.

The language removed from the second Question Presented read "without addressing a." This too was perceived to be a misstatement because the Third Circuit *did address* the subject matter jurisdiction question, albeit without written analysis. Thus, the phrasing of the presented question was amended accordingly. The Third Circuit specifically acknowledged the jurisdictional question regarding the propriety of removal in Footnote 3. By considering the merits of the case and dismissing it on a procedural ground, the Third Circuit implicitly found subject matter jurisdiction based upon the analysis sufficiently expounded upon by the District Court in its Recommendation and Order. *See* App. 11-29. The real question, then, is whether it is reviewable error for the Third Circuit to fail to provide specific and written record of its analysis of every issue presented to it.

Again, Petitioners' failure to present this Question accurately is, in and of itself, a sufficient reason to deny the Petition for a Writ, per Rule 14.4. The Court of Appeals simply gave no indication that it ignored the jurisdictional question.

ARGUMENT

1. The Petition Does Not Present an Important Question of Federal Law that Should be Decided by this Court

Petitioners insist that their appeal presents an important question of federal law. However, they fail to explain why or how the question presented (inaccurately as noted above) is one that should be decided by the Court. Instead, Petitioners attempt to create an impression that this case presents a factual scenario for which this Court has been waiting. Petitioners attempt to persuade by seizing upon this Court's comment in *Watson v. Philip Morris Cos.*, 127 S. Ct. 2301 (2007) that "whether and when particular circumstances may enable private contractors to invoke [the federal officer removal] statute" did not need to be examined under the facts of that particular case. *Watson* simply does not have the import which Petitioners attempt to assign. The *Watson* Court merely noted an obvious distinction between the private contractor in that action and the government contractor in the matter of *Winters v. Diamond Shamrock Chemical Co.*, 149 F.3d 387 (5th Cir. 1998) That same distinction lies herein. It is undisputed that Duquesne Light was a government contractor. The right of a government contractor to remove a civil action under 28 U.S.C. Section 1442(a)(1) was fully analyzed by this Court in *Mesa v. California*, 489 U.S. 121 (1989). Duquesne Light's removal of the case *sub judice* falls squarely within the *Mesa* criteria established by the Court and further review of this case is unnecessary.

In addition, as explained in the preceding section, this case does not present the question that Petitioners contend it does. Namely, this case does not present the Court with an opportunity to clarify the causal nexus criteria of federal officer removal where the conduct at issue (i.e., Duquesne Light's use of asbestos-containing insulation) was not specifically directed by the government. As found by the District Court and affirmed by the Third Circuit by implication, Duquesne Light's conduct which gave rise to Petitioners' action was *specifically* directed by the government. Federal law is already well settled on the availability of federal officer removal under these circumstances. There is no pressing need for this Court's intervention.

2. The Petition Does Not Present Any Conflict Between United States Courts of Appeals on an Important Matter

Petitioners attempt to engineer two alleged conflicts between the Third Circuit's ruling and decisions of other circuits on the same issue. In the first instance, no such conflict exists since the Third Circuit did not provide a written analysis of its reasons for finding subject-matter jurisdiction (as addressed more fully hereafter) in its nonprecedential opinion. Nonetheless, even its implied finding that Respondent's removal under the federal officer statue was proper does not merit review by this Honorable Court. The Petition for Writ of Certiorari should not be granted because the conflicts raised by Petitioners either do not exist or are not presented by the case at hand.

a. There is No Conflict with *Winters* and/or *Isaacson*

The first conflict alleged by Petitioners is between this case and the *Winters* case. Petitioners accurately represent that in *Winters* the Fifth Circuit held that to establish the causal nexus required to justify removal under the federal officer removal statute, it must be demonstrated that the government directed the specific aspects of the contractor's conduct which gave rise to the suit. Petitioners reason that this holding conflicts with this case because the Third Circuit "effectively held" that the causal nexus requirement does not require such a showing. It is clear that the Third Circuit made no such holding, "effectively" or otherwise. This case does not conflict with *Winters* in any manner because in both instances the facts established that the conduct at issue *was* specifically directed by the federal officer and therefore the causal nexus requirement was satisfied.

The Third Circuit Court of Appeals affirmed, without quarrel, the District Court which found that Duquesne Light's use of asbestos-containing insulation *was* specifically directed by the government. Thus, the conflict with *Winters* alleged by Petitioners is wholly dependent upon Petitioners' own misstatement of the facts regarding what occurred in the proceedings below. Neither *Winters* nor this case presents a factual scenario whereby the conduct that was allegedly in contravention of state law was not directed by the government.

Petitioners also claim this same conflict exists between *Winters* and *Issacson v. Dow Chemical Co.*,

517 F.3d 129 (2d Cir. 2008), wherein the Second Circuit allegedly found that an act not specifically contemplated by the government contract was sufficient to satisfy the causal nexus requirement, and that it is enough that the government contract gave rise to the conduct. While the Petitioners' accurately quote the *Isaacson* case in this regard, it is clear that the quoted statements are dicta. Indeed, the quote relied upon by Petitioners begins with the words "even if ..." Such language clearly foreshadows that the facts to follow are not those which the court is actually contemplating in the case before them. In truth, the facts considered and the holdings reached in *Isaacson* are identical to the facts considered and the holdings reached in *Winters*, for all relevant purposes. In both *Winters* and *Isaacson*, the relevant facts were the degree of government control over the formulation and composition of Agent Orange. In both *Winters* and *Isaacson*, the courts of appeals found that the composition and formulation of Agent Orange were specifically directed by the government, and that the causal nexus requirement of federal officer removal was therefore met. As such, both *Winters* and *Isaacson* are in complete accord with each other and with this case, in that all three courts found specific direction by the government with respect to the conduct at issue. There is simply no conflict among the three cases and further review is not justified.

Further, no reviewable conflict between this case and any other case can exist because the Third Circuit's opinion was specifically deemed to be "not precedential." The Internal Operating Procedures for the Third Circuit provide insight into the weight and authority of the different types of opinions the Court

authors. Rule 5.1 recognizes that the Court issues two types of opinions: precedential and not precedential. A "not precedential" opinion is not published as a slip opinion. I.O.P. 5.3. In addition, such an opinion is designated as "not precedential" in the first instance because it appears to have value only to the parties and the trial court. I.O.P. 5.3 Internal Operating Procedure 5.7 provides that the Third Circuit ". . . does not cite to its not precedential opinions as authority." Further, "[s]uch opinions are not regarded as precedents that bind the court because they do not circulate to the full court before filing." I.O.P. 5.7 Thus, the conflict, if any, between *Winters* and *Isaacson* remains isolated to those two cases. The instant case has not joined the alleged discord as no courts or parties will rely upon it.

b. There is No Conflict with *Boyle* and/or *In re Joint*

The second conflict alleged in the Petition is between this case and two others: this Court's opinion in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988); and the Second Circuit's opinion in *In re Joint Eastern and Southern District New York Asbestos Litigation*, 897 F.2d 626 (2d Cir. 1990). Petitioners assert that the Third Circuit's decision in the case at hand conflicts with these cases by "invo[king] the government contractor defense . . . absent government-imposed specifications requiring the particular conduct asserted to violate state law." Once again, Petitioners misstate the proceedings in the courts below in order to manufacture a conflict. As noted repeatedly herein, the District Court (affirmed by the Court of Appeals) found that the government required the particular conduct (i.e., the use of asbestos) that

allegedly violated state law. Thus, to the extent that *Boyle* and *In re Joint* support the application of the government contractor defense in the presence of government-imposed specifications requiring the particular conduct allegedly giving rise to a violation of state law, this case is in complete accord.

The very posture of the instant case makes an assertion of conflict between it and the *Boyle* and *In re Joint* opinions untenable. At issue in both *Boyle* and *In re Joint* was the substantive applicability of the government contractor defense. In *Boyle*, the case was filed in federal court as a diversity action against the manufacturer of a military helicopter involved in the accidental death of a U.S. Marine co-pilot. Neither the federal officer removal statute nor any removal basis was at issue. Likewise, *In re Joint* dealt with the substantive applicability of the government contractor defense in the context of a motion for summary judgment by one of the defendants in a state law failure-to-warn action seeking recovery for injuries alleged to have occurred from exposure to asbestos-based cement used at the Brooklyn Navy Yard during World War II. Again, neither the federal officer removal statute nor any removal basis was at issue.

In contrast, where, as here, removal under the federal officer statute is challenged, the test is whether the defense asserted is *colorable*, not whether the defense is meritorious. *See: Mesa v. California*, 489 U.S. 121, 128-30 (1989). The validity of the defense itself has been called a "distinct subject" by this Court, which ". . . has no connection whatever with the question of jurisdiction." *Id.* at 128-29 (internal citations omitted).

Moreover, this Court, in *Watson*, declared that the federal officer removal statute is not to be construed narrowly. *Watson, supra* at 2304-05. Even if a removing defendant's entitlement to prevail on the merits of a federal defense such as the "government contractor defense" can be fairly questioned, the defendant's right to have the applicability of that defense decided in a federal forum cannot be questioned. *Watson, supra* at 2306-07. In other words, Duquesne Light is under no obligation to show, and the lower courts have never been tasked with finding, that the government contractor defense will absolve Duquesne Light from liability in this case in order for the removal to be justified. Rather, Duquesne Light need merely assert a colorable claim to this defense which it did in this case.

Neither the Third Circuit nor the District Court made any finding about Duquesne Light's entitlement to immunity based on this doctrine. Hence, as a matter of posture, no holding of either the District Court or the Third Circuit by implication, can be said to conflict with the *Boyle* or *In re Joint* decisions which address the merits of the defense and where it may properly provide immunity. In the instant case, the Third Circuit did not decide, even by implication, the same issue which the *Boyle* and *In re Joint* courts considered.

Moreover, as discussed above, even assuming that a conflict exists between the holdings of the lower courts in the instant case and the *Boyle* and *In re Joint* decisions, this Court's review is rendered entirely unnecessary as a result of the "not precedential" opinion issued by the Third Circuit. No real conflict can be created by a "not precedential" opinion.

3. The Court of Appeals Conformed with the Accepted and Usual Course of Judicial Proceedings

As discussed above, the most likely explanation for the lack of written opinion on the jurisdictional issue in the court below is that the Court of Appeals simply saw fit to rely on the District Court's thorough and able treatment of the subject matter jurisdiction issue. There is no substantive indication within its opinion that the Court of Appeals ignored the jurisdictional issue and proceeded directly to a consideration of the merits. Indeed, there is suggestion to the contrary in Footnote 3 of the opinion, wherein the Court specifically acknowledged the jurisdictional dispute between the parties. The Third Circuit simply deemed this issue unworthy of additional written analysis and treatment, as is the court's prerogative

Within its internal operating procedures, the Third Circuit specifically reserves the right to deem which cases and issues presented to them are worthy of treatment by written opinion. *See:* I.O.P. 6.2 and 4.2. Internal Operating Procedure 6.2 allows a panel of the Third Circuit to determine that no written opinion is necessary; it may simply enter a unanimous judgment order. Similarly, I.O.P. 4.2 provides that the members of the court will decide for themselves in what cases they will issue written opinions. Thus, the Court of Appeals was under no obligation to satiate Petitioners' desire for additional and different analysis from that of the District Court on the issue of subject matter jurisdiction. Lack of written treatment cannot be equated with lack of consideration. Nowhere within the Third Circuit's

opinion is it indicated or even suggested that the Court found no need to pass upon the jurisdictional issue as suggested by Petitioners. The Court of Appeals simply used its discretion to determine what issue would receive focus in its written opinion. The Court of Appeals could have affirmed the District Court without written opinion; instead, it chose to address only those issues it deemed worthy of written analysis.

The Court of Appeals' decision to expend its effort and ink on the dispositive issue before it is neither unusual nor improper. Courts, in their written opinions, frequently devote more attention to the issue(s) which ultimately dispose of a case. In this respect, the Third Circuit did not depart from a common, judicially efficient practice. It is clear that Petitioners desired additional and, in truth, *different* analysis regarding the propriety of Duquesne Light's removal based on the federal officer removal statute, but the Third Circuit's failure to give Petitioners all they had hoped for does not warrant intervention by this Court where the Court of Appeals acted properly and within its own discretionary parameters.

CONCLUSION

No important federal question is presented by this Petition for Writ of Certiorari, and no conflict between United States Courts of Appeals has, or could have, been created by the Third Circuit's nonprecedential opinion. Moreover, the Court's supervisory powers over the Courts of Appeals need not be exercised here as the manner of disposition by the Court of Appeals was entirely proper and within its discretionary powers. As such, Respondent, Duquesne Light Company, respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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